UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/C.6/49/3
10 November 1994

ORIGINAL: ENGLISH

Forty-ninth session
SIXTH COMMITTEE
Agenda item 137

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

Letter dated 4 November 1994 from the Acting Permanent Representative of Japan to the United Nations addressed to the Secretary-General

I should like to draw your attention to the statement made by Mr. Chusei Yamada on the draft statute for an international criminal court in the Sixth Committee on Wednesday, 26 October 1994, in which he stated that "the Government of Japan will in due course submit its views on these problems in a separate document".

Enclosed are the comments of the Government of Japan on the draft statute for an international court, as referred to in the above-mentioned statement.

I should be grateful if you would have this letter and its annex circulated as a document of the General Assembly, under agenda item 137.

(Signed) Shunji MARUYAMA
Ambassador Extraordinary
and Plenipotentiary
Acting Permanent Representative
of Japan to the United Nations

94-44325 (E) 021294 09/12/94

/...

ANNEX

Comments on the draft statute for an international criminal court

The Government of Japan wishes to submit the following comments on the draft statute for an international criminal court formulated by the International Law Commission, as a follow-up to the statement by its representative in the Sixth Committee on 26 October 1994. It is the view of the Government of Japan that there exists a need for improvements in the draft statute in order for it to be universally acceptable.

The comments contained in this submission are made as a contribution to further deliberation for such improvements. The Government of Japan intends to offer, in due course, drafting proposals on the points referred to in these comments.

I. GENERAL COMMENTS

In order to secure the proper functioning of the International Criminal Court, which is one of the systems of criminal justice, it is essential to have three laws governing the Court. They are: (a) a substantive law which clearly defines what sorts of acts constitute crimes and what punishments are imposed on such crimes, (b) a procedural law which provides in detail for investigative procedures, trial procedures, rules of evidence, appeals, retrials, procedure of execution of penalties, etc., and (c) a court organization law which sets out the necessary qualifications of judges, procedures for taking disciplinary action against them, etc. Only with the enactment of these laws which protect the rights of suspects and defendants, clarify the truth of criminal cases and impose proper punishment for the criminal acts involved can the objectives of the Court be accomplished.

According to the commentaries, the draft statute seems to be basically designed as a procedural law, although it is intended to cover all of the above three laws in one. While it is somewhat well arranged in terms of the organization of the Court, it is nevertheless very inadequate in terms of substantive and procedural matters. Apart from this draft statute, the International Law Commission is also working on the draft Code of Crimes against the Peace and Security of Mankind, but the draft Code at its first reading, too, mixes the procedural law with the substantive law, though it places emphasis rather on the latter, and consideration needs to be paid to adjusting it with the draft statute.

Though the draft statute and the draft Code are not necessarily related to each other in such a way that the former is a procedural law and the latter substantive, and the two drafts have been prepared independently, it is nevertheless essential to adjust and coordinate the interrelationship between the two, because there is considerable duplication in the contents of both drafts in the final analysis.

We fully understand that the establishment of the International Criminal Court is urgently required to meet the needs of international society. However, if the Court, which should be a model criminal justice organ, should be set up hastily, without distinguishing between and establishing substantive, procedural and organizational laws, and if it should not pay adequate regard to the long-standing domestic efforts of each country to protect the rights of suspects and defendants and ensure them a fair trial, it would be feared that this new institution would very likely fail to obtain the cooperation of various countries, and be rendered ineffective.

Therefore, we think it necessary that the draft statute be coordinated with the above draft Code. As much time as is needed should be given in order to review it thoroughly. Concretely speaking, there should be set up in the Sixth Committee a forum composed not only of international law experts but also an appropriate number of criminal justice experts representing different legal systems around the world, and entrusted with the task of further studying the statute carefully, on the basis of the comments of Japan and other countries.

Incidentally, this review should be carried out in coordination with the work done on the Code at the "reading" stage of the International Law Commission, with the legal nature, status and mutual connection of both drafts being made clear.

This draft statute involves not only issues arising from procedural, substantive and organizational laws but also problems relating to adjustment with the results of international cooperation in the past in the field of criminal justice and with the judicial systems of various countries. These problems should be kept in mind when the International Criminal Court is set up to ensure its effectiveness. We elaborate on them below.

II. SPECIFIC PROBLEMS INVOLVED IN THE SUBSTANTIVE LAW

A. Importance of protecting the rights of suspects and defendants

In any criminal justice system, apart from the effective control of crime, the importance of protecting the rights of suspects and defendants cannot be overemphasized. In the field of criminal justice as well, international efforts, such as the establishment of international standards, have continually been made to guarantee human rights.

From this standpoint, the principle of nullum crimen sine lege (no crime without law), which is a fundamental rule of modern criminal justice, must be strictly observed. However, the crimes which come under the jurisdiction of the International Criminal Court under this draft statute are not at all clear in terms, for example, of their constituent elements and the punishments to be imposed, etc. However, if the provisions of the draft were applied as they are now, it would be against the principle of nullum crimen sine lege, incurring serious infringements upon the rights of the suspects and defendants.

B. Specific problems which are supposed to come out from the standpoint of the principle of nullum crimen sine lege

There may be different interpretations of nullum crimen sine lege but, considering the present standards of protection of human rights, it must be understood as a principle which clarifies, by written statutes and before the act concerned is committed, what acts constitute crimes and what punishments are imposed upon such crimes.

The principle of nullum crimen sine lege is recognized in many countries, including Japan, as an invariable principle of criminal justice to protect human rights and freedom of conduct from political despotism or inequality or arbitrary punishment, so unless the procedures of the International Criminal Court fully comply with this principle, it is likely that the human rights guaranteed domestically by many countries will be threatened.

However, in this draft statute there are a number of points which are questionable in the light of the principle of nullum crimen sine lege.

1. Article 20 of the draft statute provides that the International Criminal Court has jurisdiction over the crimes of "genocide", "aggression", "serious violations of the laws and customs applicable in armed conflict", and "crimes against humanity", but it contains no provisions for the requisites constituting these crimes. Thus it will be contrary to the principle of nullum crimen sine lege if the Court is to impose punishments for these crimes.

According to the commentaries to the draft statute, the draft statute has been prepared, basically as a procedural law. This may be so, but, as regards "aggression", "serious violations of the laws and customs applicable in armed conflict" or "crimes against humanity", there is no international written law, other than the draft statute, which defines these crimes as crimes for which individuals may be held criminally responsible and for which they may be prosecuted. Therefore, it will in any event be against the principle of nullum crimen sine lege if the International Criminal Court imposes punishments for these crimes under the draft statute.

Some people may contend that these crimes are constituted under international customary law, but whether this is so is in itself disputable and, furthermore, punishing a person under customary law is never permissible under the principle of nullum crimen sine lege. As to this point, the International Covenant on Civil and Political Rights provides in its article 15, paragraph 2, that: "Nothing in this article shall prejudice the trial and punishment of any person for any act or commission which, at the time when it was committed, was criminal according to the general principle of law recognized by the community of nations." Assuming that that paragraph does not prohibit the imposition of punishments under international customary law and that "aggression", "serious violations of the laws and customs applicable in armed conflict" and "crimes against humanity" constitute crimes under international customary law, it is considered permissible, under that Covenant, for the International Criminal Court to impose punishments for these crimes. But in the light of the fact that the provisions of article 15, paragraph 2, of the Covenant (and article 39, subparagraph (a), of the draft) are inadequate in providing for the principle of

nullum crimen sine lege and that the punishment of crimes under customary law is prohibited in many countries today as it is against the principle of nullum crimen sine lege, the International Criminal Court should not impose punishment under customary law.

Furthermore, even if one assumes that "aggression", "serious violations of the laws and customs applicable in armed conflict" and "crimes against humanity" constitute crimes under international customary law, the requisites constituting these crimes are not clear as an inevitable feature of customary law (the commentaries to the draft statute admit, for example, as regards the definition of crimes against humanity, that some questions remain unresolved). The principle of nullum crimen sine lege demands, as its most important element, that the requisite constituents of a crime be provided for unequivocally and precisely and so, from this standpoint, too, if the International Criminal Court imposes punishments for these crimes it will be against the principle of nullum crimen sine lege.

With regard to "genocide", there exists the so-called Genocide Convention, which provides for the definition of "genocide", but the definition in that Convention uses such wording as "conditions of life calculated to bring about its physical destruction in whole or in part", "measures intended to prevent births within the group", etc. Thus it cannot be said that the Convention provides for the constituent elements of the crime unequivocally and precisely. Also, the countries which are not contracting parties to the Convention and their nationals will have the same problem as they have with "aggression", since "genocide" does not constitute a crime under any written statute.

2. Article 20 (e) provides that, in addition to the above crimes, the crimes under the treaties listed in the annex come under jurisdiction of the International Criminal Court, but the provisions of those treaties presuppose that the requisite constituents of the crimes therein be provided for separately by national law, and they have not been drafted on the basis of the concept that the provisions of the treaties are directly applied, so they are quite unclear as to the requisite constituents of the crimes. Therefore, it will after all be against the principle of nullum crimen sine lege if the International Criminal Court imposes punishment based on those treaties.

In this connection, article 33 of the draft statute includes national laws among the laws to be applied by the International Criminal Court, but there is no provision as regards which country's national law is applicable and in what cases, so the existence of article 33 of the draft does not suffice to clarify the requisite constituents of crimes.

3. Under the principle of nullum crimen sine lege, it is imperative that statutory penalties be fixed for each crime. In the draft statute, article 47 contains only general provisions about applicable penalties, listing life imprisonment, imprisonment for a specified number of years, a fine, so it cannot be said that the type of penalties to be imposed and their maximum limit for specific crimes are clearly provided for.

In this regard, paragraph 2 of the same article stipulates that, in determining the penalties to be imposed, the International Criminal Court may

make reference to the penalties provided for by the national law of the State involved, but it is not clear which country's national law is referred to in what sorts of cases or what effect such reference brings about. Therefore, statutory penalties are not made clear by the paragraph.

4. Under the principle nullum crimen sine lege, it is necessary that the factors which constitute or do not constitute a defence and also the factors for aggravating or mitigating a sentence, which are common for all crimes, be definitely provided for by written statutes. For example, conditions for acquittal by reason of self-defence, conditions for acquittal or mitigation of sentence by reason of mental disorder, conditions for holding a co-offender responsible for the crime, etc., must be stipulated concretely and precisely. But the draft statute has no provision on these points. Therefore the fact that the application of national laws is made possible according to article 33 of the draft does not satisfy the requirements of the principle of nullum crimen sine lege.

5. The idea of applying national law at the level of international law to compensate for lacunae in substantive criminal law is worth considering as a transitional measure, although the manner in which this is effected will require deliberate study. Though articles 33 and 47 of the draft stipulate the application of national laws, we must say that the fact that which country's national law is applied in what sorts of cases is not stipulated is, in itself, clearly contrary to the principle of nullum crimen sine lege. (For instance, it may happen that a law of which a suspect or defendant has no knowledge is applied, and this is, needless to say, inappropriate.) If the application of national laws is to be recognized, the draft statute must provide precisely for the kinds of cases in which national laws are applicable, the countries whose laws are applicable, as well as the scope of application.

Also, article 33 of the draft recognizes the application of "principles and rules of general international law", but if we should permit the application of such concepts as are so unclear as a criminal substantive law, it means that such penalty may be imposed upon the offender as he could not have predicted. Therefore, in the light of the principle of nullum crimen sine lege, this is not permissible in the field of criminal justice.

6. As mentioned above, if the crimes listed in article 20 of the draft statute are to come under the jurisdiction of the International Criminal Court, it is mandatory for the statute of the Court or other written international law to provide clearly for the requisite constituents of these offences, statutory penalties, factors for the constitution or non-constitution of crimes and also factors for aggravation or mitigation of sentences, which are common for all crimes, and the imposition of penalties by the International Criminal Court without recourse to such a step would be against the principle of nullum crimen sine lege.

In this way, crimes are to be stipulated in written law which provides for their constituent elements and statutory penalties, etc. Thus, the following should be explicitly written into those documents according to the principle of prohibition of ex post facto law, i.e, that the International Criminal Court can

try and punish only those crimes which are committed after written law clearly stipulates their constituent elements and statutory penalties, etc.

III. SPECIFIC PROBLEMS INVOLVED IN THE PROCEDURAL LAW

A. Necessity of maintaining a fair and impartial court

The draft statute contains some provisions concerning the investigative and trial procedures of the International Criminal Court, such as the composition and jurisdiction of the Court, investigative and trial procedures, rules of evidence, appeal, review and execution of sentences, etc., but these are simply elementary provisions and, it must be said, quite inadequate for guaranteeing the rights of suspects and defendants and ensuring a fair and impartial trial.

Among other things, since the International Criminal Court examines the criminal responsibility of an individual person in the name of the community of nations, an aggregate of all nations and mankind, the difference between the power of the accuser and that of the accused is only too obvious. Moreover, suspects and defendants are charged and tried by prosecutors and judges who not only speak different native languages but also represent different cultural backgrounds, customs and practices. Therefore, when the accused try to present their cases and defend themselves, they are tremendously handicapped. In the international justice system, therefore, we have to pay particular attention to protecting the rights of the accused, taking into account the factors that may not often be of relevance to national criminal judicial procedures.

Also, the crimes which are subject to prosecution by the International Criminal Court are very serious ones which draw world attention, and it may be expected that the pressure of world opinion to exact punishment of the suspect or defendant will become very great. So no one can deny the apprehension that the Court may be influenced by such strong feelings of the world community and impose punishments without adequate evidence. Therefore, there should be stipulated strict safeguards to ensure that a fair and impartial trial is conducted, based only on admissible evidence, by elaborating provisions relating to the organization of the Court, including the disqualification and challenge of judges as well as the complete rules of evidence.

In addition, since the crimes which are to be subject to prosecution in the International Criminal Court in many cases tend to be those committed in the context of political turmoil, there is the possibility of the Court being politically abused through the filing of false accusations against political opponents, perjury, the destruction of evidence, etc. Further careful consideration must therefore be given to this point, including whether it is necessary to provide for sanctions. According to article 44 of the draft, States parties are obligated to extend their laws of perjury to their nationals who have given false evidence before the Court, but inasmuch as it is the fairness of the national trial proceedings of each country that the laws against perjury are intended to protect, the propriety of extending such national laws to proceedings overseas simply because the person who committed perjury is its national is theoretically and practically questionable.

Incidentally, it is said that the draft statute has been prepared using the Statute of the International Court of Justice for reference, especially as regards the organization of the Court, etc. But as is clear from the special feature of the ICC trial as mentioned above, the ICC is basically different from the International Court of Justice which tries disputes between nations which are on an equal footing. It is obvious, therefore, that the ICC Statute, if it is prepared simply following the pattern of the ICJ Statute, will not be adequate.

B. Specific problems involved in the procedural law

1. Investigative procedure

The physical detention of a suspect prior to trial must be limited as far as possible. According to article 28 of the draft statute, a suspect may be detained for 90 days, as a general rule, before he is put on trial; but the Presidency may permit unlimited detention. This is not appropriate.

Also, when it is necessary to limit the rights of a suspect or a third person for the purpose of gathering evidence, it must be done within necessary limi s and, for this purpose, the Statute is required to precisely provide for the types of compulsory measures permitted for the gathering of evidence and the conditions for the issuance of warrants for this purpose as well as for the procedures to enforce the warrants. The Statute must also provide precisely for the conditions regarding the admissibility of evidence to ensure faithful adherence to these procedural rules. However, the draft statute as it stands now simply provides in article 26 that the Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation; it makes no provision for the types of compulsory measures to be taken for investigation, nor does it make any stipulations as to the conditions for the issuance of a subpoena or warrant or the procedures to be followed by each State party in enforcing the measures based on such warrants.

Incidentally, we think too many important powers are given to the Presidency, which is composed of only three members. (These powers include the issuance of warrants required for investigation, examination of indictments, decision as to whether to detain or release a suspect, revision of a conviction, etc. Also the President, who is one of the members of the Presidency, also becomes a member of the Appeals Chamber, which means that the judge who is concerned in the issuance of a warrant, etc., is also concerned in an appellate proceeding. This is inappropriate from the standpoint of maintaining a judge's objectivity.)

2. Rules of evidence

As regards the rules of evidence, too, the draft statute provides in article 44 only that "evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible", and it does not provide for concrete conditions to make evidence admissible. This provision is therefore inadequate.

3. Trial procedures and others

The draft statute provides in articles 39, 11, 48, 50 and 59 for trial procedures, excusing and disqualification of judges, appeals, revision of a conviction, and enforcement of sentences, respectively. But these are all very general and vague provisions. Moreover, the draft statute does not provide for important matters which seriously affect the rights of a defendant, such as the period allowed for filing appeals. There are serious shortcomings.

C. Necessity for the draft statute to provide for procedural matters in themselves

According to the commentaries to the draft statute, it seems that the statute has been drafted to provide only for the framework of the procedures to be followed by the International Criminal Court and that the details will be stipulated in the Rules of the Court, in accordance with the provisions of article 19 of the draft statute.

However, this idea is not appropriate, because such matters as "investigative procedure", "trial procedure", "rules of evidence", which are delegated to the Rules of the Court according to article 19, are of crucial importance in protecting the rights of suspects and defendants and also in ensuring fair and impartial trials. These provisions are to be stipulated clearly and in detail in the draft statute, which is a treaty. In other words, the administration of criminal justice most certainly limits the rights of suspects and defendants; therefore, in order to prevent undue infringements on human rights, the criminal procedures of a country should be stipulated, basically, by the law enacted by its legislature which is composed of representatives of the people, while the criminal procedures of the International Criminal Court should be laid down, basically, in a treaty.

According to the commentaries to the draft statute, there seem to be some opinions that it would be cumbersome to have the Statute provide for all the procedural matters in it and, if that is done, such provisions may lack flexibility, so detailed procedures had better be drawn up by judges in the Rules of the Court and gradually improved in the light of their experience. However, from the standpoint of protecting the rights of suspects and defendants and ensuring a fair and impartial trial, it goes without saying that troublesomeness cannot be a good excuse for dispensing with detailed provisions. Also, if a criminal procedure is stipulated flexibly, judges and prosecutors will have more room to exercise their discretion, and they may abuse it and increase the possibility that the rights of suspects and defendants are unduly infringed upon. Therefore, we cannot say it is desirable that the provisions concerning criminal justice should have flexibility.

According to article 19 of the draft statute and the commentaries thereto, the initial Rules of the Court and important amendments of the rules are submitted to a conference of States parties for approval, but there is no provision regarding the procedure for approval at a conference. In order to solve the problems raised, a strict procedure for approval must be established. Also, since the States parties have the obligation to cooperate in the

investigation and trial procedure at the request of the Court, it is necessary, in the light of this point as well, that the amendment of the Rules of the Court be approved under a strict procedure. Moreover, article 19 of the draft statute provides, in effect, that the rules to be revised which the Court does not consider important may be confirmed by the Presidency unless a majority of States parties communicate in writing their objections, but this is inappropriate for the same reason.

IV. PROBLEMS INVOLVED IN THE LAW OF THE ORGANIZATION OF THE COURT AND OTHERS

The draft statute seems to be designed to ensure the fairness of the Court by setting forth the provisions concerning the qualifications and selection procedure for judges and prosecutors but, since judges and prosecutors are not faultless, it is inevitable, as the basic requirements for ensuring the fairness of trial and the protection of the rights of suspects and defendants, that there should be included in the statute provisions concerning criminal compensation in cases where a suspect placed under physical restraint has not been prosecuted or a defendant prosecuted has been acquitted by the Court and provisions concerning compensation for damages suffered by a defendant or other person involved as the result of an unlawful act due to intentional or gross negligence on the part of a judge or prosecutor, etc., disciplinary provisions for delinquent or unlawful acts by judges, prosecutors or other personnel of the Court; provisions aimed at preventing such acts committed by judges and prosecutors; and also the provisions concerning remedial measures in cases where the rights of a suspect, defendant or other person involved are infringed upon by such acts. The draft statute as it stands now has inadequate provisions.

As regards the impeachment of a judge, it is obvious that it cannot be stipulated in the Rules of the Court which the judges of the Court draft, so the impeachment clause must be incorporated in the Statute, which is a treaty, clearly defining the organization of the impeachment court.

V. PROBLEMS OF ADJUSTMENT WITH THE RESULTS OF INTERNATIONAL COOPERATION ACCOMPLISHED UP TO THE PRESENT IN THE FIELD OF CRIMINAL JUSTICE

With regard to international cooperation for the suppression of crime which has international implications, such cooperation has been developed up to now in such a manner that, based on international law, which provides for general definitions of the acts required to be punished, each country has prepared or revised its own penal code, providing for the requisites for constituting the crimes concerned and specifying the penalties for them and the crimes have been prosecuted and punished in the national courts of the country. Contrary to that, however, the idea of establishing the International Criminal Court, which is an organ under international law, is to directly call an individual person to account for a crime, so this is an approach quite different from the way international cooperation has been carried out up to the present. Therefore, the International Criminal Court, if established, should pay special attention to adjusting its work with the results of the international cooperation hitherto

achieved, and it should be an institution supplementing the existing international cooperation system.

However, the draft statute places under the jurisdiction of the International Criminal Court many of the crimes listed in the treaties (the so-called "suppression convention") specifying the crimes for which each country should prepare or revise its national law and prosecute and punish in its national courts, according to the way of handling hitherto followed. Although the draft statute provides in article 20 (e), for the purpose of limiting the jurisdiction of the Court, that, as regards the crimes under the treaties, only those exceptionally serious ones of international concern come under the jurisdiction of the Court, the standards for seriousness itself are not clear at all, and the reasons or necessity for placing these treaty crimes under the jurisdiction of the Court are not clarified, either in the commentaries to the draft statute or elsewhere. Those treaties which provide for the crimes to be punished by national courts have been drafted as the result of the international cooperation which has developed up to now, according to the approach followed in the past, so we are afraid that placing the crimes proscribed in those treaties under the jurisdiction of the International Criminal Court would be equivalent to carrying coals to Newcastle. (Incidentally, article 35 provides that the Court may decide that a case before it is inadmissible on the ground that it is not of such gravity as to justify further action by the Court, but as to this point too, the standards for gravity are not objective or clear.)

VI. PROBLEMS REGARDING THE ADJUSTMENT OF THE DRAFT STATUTE WITH NATIONAL JUDICIAL SYSTEMS

Criminal jurisdiction is an essential part of the sovereignty of a State and each country has developed a criminal justice system of its own, with the Constitution as its prop and stay and with its history and culture for a background. It is essential to pay attention to adjusting it with the judicial systems unique to each country. Therefore, in drafting the Statute of the International Criminal Court, the Statute may be flexibly constructed, giving each country the extensive right of choice and room for reservation, with a view to ensuring the effective application of the Statute. Such consideration being given, there would emerge no country which, notwithstanding that it agrees to the concept of the Court, could not accede to the Statute by reason of its discrepancy with its national systems, such as its conflict with the Constitution, etc. From such a standpoint of adjusting with national judicial systems, the following points, for example, seem to require further study.

A. Jurisdiction of the International Criminal Court

Transferring the criminal jurisdiction of a State to the Court means for the State that its legislative or administrative authority limits the scope of exercise of judicial power, even though it is stipulated that such transfer or non-transfer is entirely up to the discretion of the State. In the case of Japan, this will most likely conflict with article 79 of the Constitution, and in many other countries too there is a strong possibility that it will conflict with their Constitution and not be easily acceptable.

In this regard, it in inappropriate for the draft statute to have given the Court the inherent jurisdiction over genocide. As it is conceivable that there will be countries which have extreme difficulties in acceding to the Statute because it conflicts with their Constitution, as mentioned above, this crime should be handled under the "opt-in" system, as in the case of other crimes.

B. Non bis in idem (prohibition of double jeopardy)

According to article 42 of the draft statute, no person who has been tried by the International Criminal Court shall be tried again by a national court, but in the light of the fact that conviction in a foreign country is not necessarily construed to become a condition for non bis in idem, further study seems necessary with regard to the effect of the judgement of the Court. For example, one way that is thinkable is to allow a national court to retry a person who has been tried by the Court, but, for a person who has received a multiple number of "guilty" sentences for one and the same act, such sentences will be adjusted at the time when they are executed (see article 5 of the Penal Code of Japan).

C. The issuance of warrants

The draft statute provides in article 29 that "a person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected." As to this point, too, it is not clearly indicated how the warrant issued under the draft statute fits in with national laws. (For example, on what grounds is the propriety of the enforcement of a warrant issued under the Statute determined under national laws? And what measure can be taken by a national judicial officer if unlawful acts are committed in the course of the enforcement of the warrant? These questions and others still remain unresolved.)

Furthermore, under articles 51, 53, etc., of the draft statute, all States parties or those States parties which have accepted the jurisdiction of the International Criminal Court will have the compulsory obligation to produce evidence, carry out an arrest or a detention or transfer an accused, in the case of genocide or any other crime, respectively. However, for the reasons stated above, the draft statute should be adjusted with the national judicial system of each country.

D. Obligation to extradite or prosecute

Article 54 of the draft statute provides that, with respect to the crimes under treaties which are to come under the jurisdiction of the Court according to article 20 (e), the custodial State of the suspect shall be required either to "extradite or prosecute" the suspect. But it is not clear how this provision fits in with other treaties now in force, such as the Hostages Convention, which imposes a similar obligation.

Under the Hostages Convention, the obligation to "extradite or prosecute" is laid down as the obligation of creating a secondary jurisdiction to supplement the obligation of creating a primary jurisdiction imposed upon the State party in whose territory the crime occurred. Thus there arises a question as to whether article 54 intends to impose the obligation to "extradite or prosecute" as a more general obligation and not as such a secondary, supplemental obligation.